No. 06-6911

IN THE SUPREME COURT OF THE UNITED STATES

JAMES D. LOGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioner's prior state convictions for misdemeanor battery did not result in the deprivation of his civil rights, and thus his civil rights have never been "restored." The question presented is whether those convictions were nonetheless exempt from consideration as prior convictions under the Armed Career Criminal Act, 18 U.S.C. 924(e)(1), on the ground that petitioner's civil rights should be regarded as "restored" within the meaning of 18 U.S.C. 921(a)(20).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 453 F.3d 804.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2006. The petition for a writ of certiorari was filed on September 29, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Western District of Wisconsin, petitioner was

convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-9.

1. Under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(1), a defendant convicted of being a felon in possession of a firearm is subject to a mandatory minimum 15-year sentence if he had at least three prior convictions for violent felonies or serious drug offenses. An offense classified by a State as a misdemeanor may qualify as a violent felony if the offense was punishable by more than two years of imprisonment. 18 U.S.C. 921(a)(20)(B), 924(e)(2)(B). Excluded from consideration, however, is "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored." 18 U.S.C. 921(a)(20).

2. On May 31, 2005, police officers responded to a domestic disturbance complaint by Asenath Wilson. Wilson told police that petitioner, her boyfriend, had punched her in the face. She also said that petitioner was outside her residence and that his car, which was parked in her garage, contained drugs and perhaps a handgun. After obtaining petitioner's consent to search his car, a police officer found a loaded pistol inside the glove compartment. The officer also recovered from the car a switchblade

knife and a device used for smoking crack cocaine. Gov't C.A. Br. 5.

3. After petitioner pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), the district court imposed a 15-year sentence under the ACCA. The court found that petitioner had one prior state felony conviction for possessing a controlled substance, and three prior state misdemeanor battery convictions that were punishable by a maximum of three years of imprisonment. Petitioner contended that the three misdemeanor convictions should be disregarded because they did not result in the loss of his rights to vote, hold public office, or serve on a jury, and should therefore be treated the same under Section 921(a)(20) as convictions for which those rights were terminated and later restored. The district court rejected petitioner's argument, holding that an offender whose civil rights had never been taken away cannot have had his civil rights "restored" within the meaning of Section 921(a)(20). If petitioner had not been treated as an armed career criminal, his advisory Sentencing Guidelines range would have been 37-46 months of imprisonment. See Pet. App. 1-2; Gov't C.A. Br. 6-7.

4. The court of appeals affirmed. Pet. App. 1-9. It held that Section 921(a)(20)'s exclusion of "[a]ny conviction * * * for which a person * * * has had civil rights restored" applies only when a State deprives a defendant of civil rights and later

restores them. Id. at 2. Because "[t]he word 'restore' means to give back something that had been taken away," the court explained that "'the 'restoration' of a thing never lost or diminished is a definitional impossibility." Ibid. (quoting McGrath v. United States, 60 F.3d 1005, 1007 (2d Cir. 1995), cert. denied, 516 U.S. 1121 (1996)).

The court of appeals acknowledged that the First Circuit had drawn a different conclusion in United States v. Indelicato, 97 F.3d 627 (1996), cert. denied, 519 U.S. 1140 (1997). Pet. App. 2. The court explained that the First Circuit had recognized that civil rights cannot be restored if they were never taken away, but had nonetheless held that defendants who never lost their civil rights should be treated the same as defendants who had their rights restored. Ibid. The court criticized the First Circuit for attempting to rewrite a statute it regarded as "infelicitous," explaining that a court is not authorized to "implement what it is sure the legislature would have done (had it faced the question explicitly) rather than what the legislature actually did." Id. at 6. The court further rejected Indelicato's reliance on the absence of legislative history showing that Congress meant to distinguish between the two situations, explaining that even the plainest legislative history cannot trump an unambiguous enactment, and the absence of legislative history certainly cannot do so. Id. at 3.

The court of appeals pointed out that under 18 U.S.C. 922(g)(9), which proscribes the possession of firearms by persons convicted of the misdemeanor crime of domestic violence, a person may not be regarded as having been convicted of such an offense "if he has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)," 18 U.S.C. 921(a)(33)(B)(ii) (emphasis added). See Pet. App. 7. Thus, the court noted that when Congress specifically addressed the issue presented here, albeit in a different statute, Congress recognized that rights can be restored only if they had been lost. Ibid. As a result, the court explained, "Indelicato's guess about what Congress 'would have done, had it thought' turns out to be wrong." Id. at 6.

The court of appeals noted that Section 921(a)(20) "create[s] ample potential for disparate treatment, but that's inherent in the legislative choice to make federal sentences depend on" state law. Pet. App. 8. "What a federal court can do, as a uniform matter, is count all state convictions unless the state extends a measure of forgiveness" by "pardon, expungement, or a restoration of civil rights." Id. at 8-9.

ARGUMENT

Petitioner contends (Pet. 6-11) that his prior state misdemeanor battery convictions should not count for purposes of the armed career criminal enhancement because they did not result

in the deprivation of his civil rights to vote, hold office, or serve on a jury. The court of appeals' decision is correct and does not warrant further review.

1. Petitioner correctly concedes (Pet. 7) that his position is at odds with the plain language of the statute. It is common ground that petitioner's state convictions are qualifying "violent felon[ies]" under 18 U.S.C. 924(e) unless petitioner "has had civil rights restored." 18 U.S.C. 921(a)(20). Petitioner concedes (Pet. 7), however, that his "civil rights were never taken away in the first place." Thus, those rights could not have been, and were not, restored. As the court of appeals explained, "[t]he word 'restore' means to give back something that had been taken away." Pet. App. 2; see Webster's Third International Dictionary 1936 (1976) ("to give back (as something lost or taken away)"). Because petitioner's civil rights were not taken away as a result of his misdemeanor battery convictions, they could not be "restored."

Section 921(a)(20)'s disparate treatment of convictions for which civil rights were never taken away, and convictions for which civil rights were terminated and then restored, is not irrational. Congress sought to exclude convictions for which a State has forgiven a defendant, whether by restoration of rights, expungement of a conviction, or pardon. See 18 U.S.C. 921(a)(20). Unlike the restoration of civil rights, expungement, and pardon, allowing the

retention of rights following conviction does not imply forgiveness.

No doubt, previously convicted defendants residing in some States will be more vulnerable to the armed career criminal enhancement than those residing in other States. But that is the natural effect of Congress's decision to allow state law to define which crimes count as predicate convictions, because state laws vary concerning a convict's loss of civil rights, and also concerning the standards for expungement, pardon, and restoration of rights. See Pet. App. 5-6; McGrath, 60 F.3d at 1009.

Petitioner errs in suggesting (Pet. 10) that Congress could not have intended the result here. As the court of appeals noted, Congress mandated that very result in a different statute even more explicitly than it did here. Pet. App. 7. Section 922(g)(9) bars firearm possession by a person convicted of a misdemeanor crime of domestic violence. In Section 921(a)(33)(B)(ii), Congress excepted from consideration prior misdemeanor domestic violence convictions for which the defendant "has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)" (emphasis added). Accordingly, as the court below observed, "when Congress addressed the subject directly," it mandated the same result the court of appeals reached here. Pet. App. 7.*

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* Although Section 921(a)(20) does not define "civil rights," the parties agree that "civil rights" under the statute include the rights to vote, to hold public office, and to serve on juries. See, e.g., Indelicato, 97 F.3d at 629; Pet. 7 n.1; Pet. C.A. Br. 9

2. As petitioner points out (Pet. 8-9), there is a conflict among the circuits on the question presented. Like the Seventh Circuit here, the Second Circuit has held, primarily on the basis of the plain meaning of the word "restored," that convictions for which civil rights were never taken away do not qualify for the exemption provided in Section 921(a)(20). McGrath, 60 F.3d at 1006-1110.

By contrast, the First Circuit held in Indelicato, 97 F.3d at 628-631, that civil rights that were not taken away should nonetheless be treated as "restored" under Section 921(a)(20). The Indelicato court acknowledged that its position was contrary to the "ordinary reading" of the word "restored." Id. at 629. Nevertheless, the court declined to be governed by the "literal" statutory language because there was "no indication" in the legislative history that Congress gave any attention to this issue, and because the court thought that Congress could not have wished to distinguish between convictions for which rights were not taken away and convictions for which rights were taken away and restored. Ibid.

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n.2, 12. If a State restores those civil rights to a defendant, the underlying conviction does not qualify as a violent felony under ACCA unless the "restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. 921(a)(20). This case concerns only the threshold question whether petitioner's civil rights to vote, hold office, or serve on a jury have been restored; it does not present the secondary question whether petitioner's possession of a handgun was prohibited by state law.

Indelcato's reliance on the absence of legislative history conflicts with this Court's repeated holdings that "mere silence in the legislative history" does not justify ignoring a statute's unambiguous text. Whitfield v. United States, 543 U.S. 209, 216 (2005). "[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of the statute." Harrison v. PPG Industries, Inc., 446 U.S. 578, 592 (1980). Nor, as discussed above, is there merit in Indelicato's assumption that Congress could not have intended to distinguish between convictions for which civil rights were not taken away and convictions for which they were taken away and restored. See pp. 6-7, supra.

3. In any event, the question presented does not warrant this Court's review. The First Circuit may eventually reconsider Indelicato in light of Section 921(a)(33)(B)(ii), which was enacted just 15 days before that case was decided. Indelicato does not address that statute, which undermines its view that Congress could not have intended the result mandated by the plain language of Section 921(a)(20).

In addition, the question presented is "unlikely to matter outside of a very few states." Indelicato, 97 F.3d at 631. The ban on firearm possession by a convicted misdemeanant applies only if the misdemeanor is punishable by more than two years of imprisonment. 18 U.S.C. 921(a)(20)(B). Such a punishment is

"unusual" for a misdemeanor, because the traditional distinction between felonies and misdemeanors is that a felony may be punished by more than one year of imprisonment. Indelicato, 97 F.3d at 631. Thus, as the court below observed, "[m]ost states would call the batteries of which [petitioner] was convicted felonies and deprive the offender of civil rights." Pet. App. 6. Moreover, "all but a very few states" take away from every felon at least one of the three civil rights in question. Indelicato, 97 F.3d at 631. Accordingly, actual restoration will be possible in the vast majority of cases, ibid., and the question presented here will arise too infrequently to warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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